VIRGINIA LAW REGISTER.

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MISCELLANEOUS NOTES.

MUCH INJURED.—In the case of *Reynolds v. Richmond & Manchester Ry. Co.*, decided by the Court of Appeals December 19, 1895, it became important to ascertain whether the injury complained of was inflicted by the defendant, or had probably been sustained by the plaintiff before the time of the accident then being investigated. In order to ascertain this fact the plaintiff was subjected to a very rigid cross-examination. And the Court, Harrison, J., delivering the opinion, says: "This examination brought out the fact that plaintiff had been cut in the face; had been shot in the hip, and had never found the ball; had at another time been shot in the arm, his nerves being so shattered that he could not pick up type; that at another time he had been met in the woods by three men at night, knocked over the head, robbed, and left senseless on the ground; that at another time he had a log to roll over him at a house-raising, and had been struck in the back by a door-knob."

NINETY-FIRST VIRGINIA REPORTS.—This volume is now in the hands of the printer and the printing will be completed during the month of March. The necessary delay for the index and binding will probably occupy about one month, and the book be ready for delivery about May 1. It was expected that all the decisions rendered in 1895 would appear in this volume, but it was found that this would make the volume too large. It has therefore been determined to make this and subsequent volumes of uniform size of about 800 pages each, besides index and tables of cases. This will make a volume of about 900 pages—very convenient and easy to handle. Volume 91 will contain the decisions to about August 1, 1895. Volume 92 is now in course of preparation and will include all opinions to June 10, 1896, and will probably appear about September 1, 1896. The change in the size of the book was only recently decided on, hence the delay in the publication of the decisions of 1895.

NEGLIGENCE—RAILROAD CROSSING HIGHWAY—DUTY OF COMPANY AND OF TRAVELLER.—In *Baltimore & Ohio R. Co. v. Griffith* (Nov. 18, 1895) the Supreme Court of the United States reaffirms the following principles regulating the respective duties and liabilities of railroad companies and travellers upon a highway

at grade crossings, as declared originally in *Continental Imp. Co. v. Stead*, 95 U. S. 161:

"If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of the whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which are required of them, such, namely, as an ordinary prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. . . .

"For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to do his duty. . . .

"The mistake of the defendant's counsel consists in seeking to impose on the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways

as the railroad companies have to run trains on the railroads. And see *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472.

"Tested by these principles, we think the Circuit Court did not err in leaving the case to the jury.

"There was evidence tending to show that these women were driving slowly and with a safe horse; that the train was several minutes behind time; and that, as they approached the low place at which a train could be seen if one were there, they stopped to look and listen, but neither saw nor heard anything; that after stopping they started, slowly driving up the hill to a point at the top between forty and fifty yards from the track, where the slope commenced, and there they stopped again and listened, but heard nothing; they then drove slowly down the hill, both listening all the time, without talking, and heard nothing; and that just as they got to the cut and the horse had his feet on the nearest rail, the train came around the curve and the collision occurred.

"Since the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves and to keep out of difficulty may properly be taken into consideration (*Washington & G. R. Co. v. Gladmon*, 82 U. S., 15 Wall., 401); it is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by *Mr. Justice* Lamar in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 417: 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determinatiou of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts.'"

TITLE BY CRIME.—In the September number of the REGISTER (1 Va. Law Reg. 383), reference was made in a brief note to the conflict of judicial opinion upon the question whether an heir apparent who murders his ancestor, or a beneficiary under a will who murders the testator, is entitled to participate in the distribution of the decedent's estate; and the better doctrine was stated to be that he should be excluded from the inheritance or gift, even though this engrafts an exception upon the statute of descents or wills.

In order to present the opposite views taken of this interesting subject, with a fuller citation of the authorities, we append, without comment, two editorial notes,

the first of which is taken from the *American Law Review*, November-December, 1894, p. 919, and the second from the *American Law Register and Review*, Oct. 1895, p. 636.

[From American Law Review.]

Descent: Whether a Man can Inherit the Property of one whom he has Murdered.—In the case of *Shellenberger v. Ransom*, 59 N. W. Rep. 935, the Supreme Court of Nebraska after first deciding the question the other way, and then granting a rehearing and holding the case up for a long time, have finally decided, under the statute of descents of that State, that a man may inherit the property of one whom he kills for that purpose. In *Deem v. Resinger*, 34 Cent. L J. 470, the Common Pleas Court of Ohio decided the question the same way; but in *Riggs v. Palmer*, 115 N. Y. 506; s. c. 29 Cent. L. J., the New York Court of Appeals, by a divided bench, held that the beneficiary in a will who murders the testator, cannot take under the will. The courts which allow a man to acquire the benefits of a statute of descents by murdering his ancestor, proceed on the ground that it is judicial legislation to make an exception to the statute. The majority of the New York Court of Appeals, in taking the opposite view, proceeded upon the ground that there are implied exceptions and reservations in all statutory enactments which the legislature cannot always foresee and guard against; that statutes are to be interpreted with reference to the principles of the common law; that a man cannot be allowed to acquire through the instrumentality of law and justice the fruits of his own crime, any more than he can in other situations, be allowed to take advantage of his own wrong; and that public policy and the safety of every man who owns property and has heirs is concerned in putting such a limitation upon a statute. The Nebraska and Ohio decisions afford curious illustrations of the manner in which lawyers reason. They will stick in the bark of statutes which have been reddened with murder, and will set aside other plain statutes as being merely *directory*. The true way to reason upon such a question is to consider whether the legislature ever intended to authorize or sanction such a result. The right is statutory. Is it to be supposed that the legislature, in enacting the statute and creating the right, intended that the right should extend to a man who should bring himself within the letter of the statute by committing the crime of murder? To indulge in such a supposition is to put a most infamous imputation upon the legislature. Another, and a just way of viewing it, is to consider that, but for the crime of the heir in murdering the ancestor, he might die in advance of the ancestor, so that some other person would inherit under the statute. He thus, by crime, seizes that which otherwise might never come to him. He is no heir until his murder makes him so; for *nemo est hæres viventis*. Was the statute enacted for the benefit of *such* heirs? "No place, indeed, should murder sanctuarize." Nevertheless, it is now sanctuarized, not in the halls of legislation, but in the halls of justice. But it would be in itself a disgrace for us to indulge in further casuistry on such a question. The fact that such decisions as those above noted can be rendered illustrates the extent to which blind and unreasoning technicalty can eliminate from the intellectual habits of lawyers all considerations of sense, justice, conscience and morality.

[From American Law Register and Review.]

Criminal Law, Attainder, Parricide, Inheritance.—The Supreme Court of Pennsylvania has recently ruled that since the Constitution of that State, Art. I, sec. 18,

declares that no person shall be attainted of felony, and sec. 19 provides that no attainder shall work corruption of blood, nor forfeiture of estate except during the life of the offender, and since the statute of descent and distribution enacts that on the death of a person his estate shall vest in his children in the absence of a will, a son who murders his father in order to get immediate possession of his share of the father's estate becomes vested with that share, in the absence of a will: *In re Carpenter's Estate*, 32 Atl. Rep. 637. Williams, J., dissented from this ruling, saying tersely, "The son could not, by his own felony, acquire the property of his father, and be protected by the law in the possession of the fruits of his crime."

The decision of the majority seems to be in accord with the consensus of opinion. The only exception is in New York, where, in *Riggs v. Palmer*, 115 N. Y. 506; s. c., 22 N. E. Rep. 188, it was held that when a beneficiary under a will, in order that he might prevent revocation of the provision in his favor, and obtain the speedy enjoyment and possession of the property, wilfully murdered the testator, he was, by reason of his crime, deprived of any interest in the estate left by his victim, and therefore was not entitled to the property, either as donee under the will or as heir or next of kin, supporting this conclusion by the never-before-heard-of proposition that *all laws*, as well as contracts, may be controlled in their operation and effect by these general fundamental maxims of the common law, viz.: No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime. But the court prudently omitted to cite any authority for such a doctrine, except some broad rules of statutory construction which had no proper application to the case in hand. The decision is thus caustically criticised in *Deem v. Millikin*, 6 Ohio Cir. Ct. 357: "It must be admitted that the most careful examination of *Riggs v. Palmer* fails to discover any clearly stated and clearly applicable principle justifying the decision. The spirit of fearless inquiry was exorcised early in the opinion, when every one contemplating a conclusion differing from that reached by the majority was warned that if he should persevere, it would be disparagingly said of him, '*qui haeret in litera haeret in cortice.*'"

Accordingly, it has been held in England that a wife who has murdered her husband is entitled to her share of his estate; *Cleaver v. Mutual Reserve Fund Life Assn.* [1892], 1 Q. B. 147; in North Carolina, that a widow convicted as accessory before the fact to her husband's murder is entitled to dower in his lands: *Owens v. Owens*, 100 N. C. 240; s. c., 6 S. E. Rep. 794; in Ohio, that a child who murders his parent can inherit his estate: *Deem v. Millikin*, 6 Ohio Cir. Ct. 357, and in Nebraska, that a father who murders his daughter inherits from her: *Shellenberger v. Ransom*, 41 Neb. 631; s. c., 59 N. W. Rep. 935, reversing 31 Neb. 61; s. c., 47 N. W. Rep. 700. In the last case cited, the court was misled by a failure to closely criticise the case of *Riggs v. Palmer*, on which it rested its decision, and it very freely acknowledges that fact, and points out the fundamental error of *Riggs v. Palmer*, in the opinion on rehearing, in 41 Neb. 631; s. c., 59 N. W. Rep. 935.

It is true that the beneficiary in a life insurance policy cannot recover, if he has feloniously caused the death of the assured, nor can his assignee do so: *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; s. c., 6 Sup. Ct. Rep. 877; but this is because the right in such a case is founded upon contract, not upon law. This very point was admitted by the Court of Appeals in *Cleaver v. Mutual*

Reserve Fund Life Assn. [1892], 1 Q. B. 147, while at the same time it held that as the wife could not take by reason of her crime, the insurance money became part of the estate of the insured, and went to her as his legal representative.

THEFT FROM THE MAIL—DECOY LETTER—FICTITIOUS ADDRESS.—In *Goode v. United States* (Nov. 25, 1895,) the Supreme Court of the United States decides in the affirmative the somewhat vexed question whether a decoy letter, with a fictitious address, is a letter within the meaning of Rev. Stat. sec. 5467, punishing thefts from the mail. It is also held that proof that the postoffice in which the letter is deposited is a postoffice *de facto* is sufficient, without proof of its regular establishment by law.

Mr. Justice Brown, in delivering the opinion of the court, thus deals with these questions:

"The main contention of the defendant is that the Muldoon letter was not a letter in point of fact, inasmuch as it was not only a decoy, that is, not written in good faith as a message or communication to the person addressed, but was wholly fictitious; that there was no such person as John Muldoon, no such place as 153 Ziegler street, and the letter could not possibly have been delivered.

"That the fact that the letter was a decoy is no defense is too well settled by the modern authorities to be now open to contention. *King v. Egginton*, 2 Bos. & P. 508; *United States v. Foye*, 1 Curt. 364; *United States v. Cottingham*, 2 Blatchf. 470; *Bates v. United States*, 10 Fed. Rep. 97; *United States v. Whittier*, 5 Dill. 35, 39; *United States v. Moore*, 19 Fed. Rep. 39; *United States v. Wight*, 38 Fed. Rep. 106; *United States v. Matthews*, 35 Fed. Rep. 890, 896; *United States v. Dorsey*, 40 Fed. Rep. 752. Indeed, this court held, at the last term, in *Grimm v. United States*, 156 U. S. 604, that the fact that certain prohibited pictures and prints were drawn out of the defendant by a decoy letter written by a Government detective was no defense to an indictment for mailing such prohibited publications.

"The question whether a letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute, is more serious, and there are certainly authorities which lend support to the theory of defendant in that regard. Thus in *Reg. v. Rathbone*, 1 Car. & M. 220, a detective mailed a decoy letter, containing a marked sovereign, to a fictitious address in London, and placed it in a heap of letters which the prisoner was about to sort, and which he had to deliver that day. The letter was not delivered, and, in the course of the same day, the prisoner was arrested and searched, and the marked sovereign found in his pocket. It was held that this was not a "post letter," or a letter put into the post; but as there was a separate count for the larceny of the sovereign, he was held to have been properly convicted of that. A similar ruling was made in *Reg. v. Gardner*, 1 Car. & K. 628, wherein the prisoner was held to have been properly convicted of the larceny of certain marked money contained in a letter which was addressed to a fictitious person, the court adhering to its previous ruling that it was not the stealing of a post letter.

"The authority of these cases, however, was seriously shaken by that of *Reg. v. Young*, 1 Den. C. C. 194. In that case the letter contained a half sovereign, and was addressed to a fictitious person. The prisoner, instead of transmitting the letter to the general postoffice, abstracted it from the receiving box, opened it,

took out the half sovereign, and kept both the letter and the money. It was held to be a post letter, having all the ingredients under the statute, and 'whether it can be delivered or no seems beside the question.' On the *Gardner Case* being cited, Pollock, Chief Baron, said he had seen reason to think his dictum in that case was incorrect, and the judges were unanimously of the opinion that the conviction was right.

"The question has been generally ruled in the same way in this country. *United States v. Foye*, 1 Curt. 364; *United States v. Wight*, 38 Fed. Rep. 106; *United States v. Dorsey*, 40 Fed. Rep. 752; *United States v. Bethea*, 44 Fed. Rep. 802.

"If the word 'letter' were given the technical construction of a written message or communication from one person to another, it would strike at the whole system of decoy or test letters, none of which contain *bona fide* communications. This would render it practically impossible to detect thefts and embezzlements by employees, since, in a large majority of cases, the letters and their envelopes are thrown away or destroyed for the very purpose of preventing their being identified in case the employee is arrested; and the contents of the letter, which it is ordinarily impossible to identify, only are abstracted. If, however, the contents can be identified, as they always are in test letters, by a private mark put upon them, the discovery of such contents upon the person of the employee affords almost conclusive evidence of the theft of the letter in which they are inclosed.

"It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession as such carrier, it is his duty to treat it for what it appears to be on its face—a genuine communication; to make an effort to deliver it, or if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employee in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be—in other words, it is not for him to judge of its genuineness. . . "While there is no direct evidence that this branch postoffice was established by authority of the Postmaster General, there was evidence that it was known as the Roxbury station of the Boston postoffice, had been used as such for years, and that it was a postoffice *de facto*. For the purpose of this case it was quite unnecessary to show that it had been regularly established as such by law. In *Ingraham v. U. S.*, 155 U. S. 434; *Wright v. U. S.*, 158 U. S. 232."

MR. JUSTICE JACKSON—IN MEMORIAM.—In our January issue, Mr. Selden painted for us the model practitioner, in his admirable sketch of the late Conway Robinson—aptly surnamed Virginia's Justinian. In a previous issue Judge Lamb portrayed the ideal teacher of the law in the late Prof. John B. Minor, of the University of Virginia. We publish below the address of Mr. Attorney-General Harmon, delivered upon the occasion of presenting to the Supreme Court of the United States resolutions of the bar of the court in relation to the death of Mr. Justice Jackson. The address embodies in brief compass a most excellent con-

ception of an ideal judge. We commend it to our readers, not more for the interest it may have for them as touching the memory of a distinguished Southerner, than for the wholesome and inspiring effect of such a characterization.

On Monday, November 25, 1895, Mr. Attorney-General Harmon addressed the court as follows:

Is is with more than a sense of official propriety that I comply with the request of the bar by presenting to the court their resolutions relating to the late Justice Jackson. We of his home circuit knew him best. There were his birthplace and his home. There his first regular judicial work was done, by which he made the reputation that led to the call from across the party wall to a seat beside your honors.

The active bar always feel some misgivings when a man in public life, even though he has won distinction there, is called to the bench, especially when he has reached middle age. But they soon found that Howell Edmonds Jackson was not so much a senator who had been appointed judge, as a judge who had served for a time as senator. His mind, naturally broad and strong, symmetrically developed, controlled by steady purpose, and directed by industry which seemed almost weariless, would have enabled him to fill with credit any place which requires such qualities. He had so filled the high positions to which the resolutions refer, but he was peculiarly fitted for the duties of a judge. He had in high degree patience to hear and consider and firmness to decide. He had an even temper, judgment unprejudiced toward men or things, and a logical turn of mind which naturally shed irrelevance and sophistry and inclined to accuracy of fact and correctness of conclusion. He loved justice in the concrete as well as in the abstract, and felt the pleasure a strong judge always takes in applying the principles of law to the redress of wrongs; but he knew and loved the system of judicial science too well to wrench or impair it, and unsettle the rights of the great body of the people, in seeking to avoid those occasional hardships against which human law, being necessarily general, cannot provide. So his decisions were of the kind which build and perfect our jurisprudence, and not a series of mere arbitrary judgments. There are few among them which the legal mind hesitates to adopt among the precedents which keep the law in healthful life and growth.

He was never chargeable with the blunders of a careless man or the vacillations of a weak one, but won respect even when he failed to convince, because he reached his conclusions by the broad highways, and not by indirection or evasion.

Some have excelled him in extent of learning and others in mere force of intellect, but few have equaled him in the comprehensive perception and abiding sagacity which result from a harmony of powers. His vigorous practical understanding was not to be bewildered by details, confused by doubtful or conflicting precedents, nor misled by refinements of reasoning. His decisions always bore the stamp of his own mind and character.

Absorbed as he was in the exacting duties of the circuit, his health was shaken before he realized it, but he never lost patience or resolution. The vigor he showed as a member of this court in the number and promptness of his opinions, as well as by their lucid thoroughness, was in spite of the dragging of disease. And one of the most striking incidents of the calm heroism of peace was the resumption of his place when the public interest required it, in the Income Tax Case. How-

ever opinion, legal and lay, was and may remain divided on the questions involved in that case, there is, and will be, no divided judgment about the high qualities shown by the opinion of Mr. Justice Jackson, which all feared would be, and which was, his last. Though the effort required undoubtedly hastened the end, no true friend or patriot can feel regret, because it has put on imperishable record an exampie of devotion to public duty whose worth cannot be too highly esteemed.

The feeling of personal bereavement which prevails to a very unusual extent among those who knew Justice Jackson seems to me the highest tribute to his memory. There is no warmth in mere mental power or acquirement, nor in the most careful correctness. These may kindle admiration or envy, but not the affection which is the best tribute of man to man. I do not mean the mere result of pleasant ways, but the sturdy liking implied in the line—

"He makes no friends who never made a foe."

He had a kind and considerate nature, but it did not blind him to his duty, nor swerve him from it; and he was free from that morbid excess of virtue which makes some good men unjust to their friends.

Reputation and honors did not affect his quiet simplicity, nor add to the unobtrusive dignity which needed no assertion.

The entire life of Justice Jackson illustrates the efficiency of steadfast devotion to duties which come without self-seeking and are met with diligence, earnestness, and sincerity of mind and purpose. His seven years as circuit judge gave him time to accomplish a most honorable career. Few positions put capacity and character to so severe a test as the office of judge of a court of first resort and general jurisdiction. This applies with great fitness to the Sixth Circuit, whose four States, reaching from Lake Superior to the Appalachian Range, like a cross section of the great Republic, present almost every variety of population, business, and laws. Such a judge must admit and exclude evidence, sift, discern, and analyze facts, and apply legal principles generally, all without the advantage of associates, sometimes with slight aid from counsel, and often with little opportunity for study and reflection. Many of his judgments are final, and few are open to complete review; but every act and utterance undergo the impartial and unerring scrutiny of the bar and the people.

The powers of this highest of all tribunals are too great to be committed to one man alone. Their exercise is placed beyond the reach and above the need of review by the association of minds which stimulate, aid, and correct each other. Who may fitly join in the deliberations of such a court but those who have stood the highest tests which the profession affords?

Justice Jackson's career as a member of this court was cut short by his untimely death; but he served long enough to confirm the fitness of his selection and sharpen still further our sense of loss. Whoever shall be called to take that vacant place will find it none the easier to fill because it was last held by Justice Jackson.